lacked the funds to purchase and that the second and third appellants bought the said land with their own money as members of the public is a travesty of the facts. The same argument was raised and rejected in *Regal (Hastings) Ltd.* v. *Gulliver, supra.* Lord Russell of Killowen said (at page 149): "It was contended that it was impossible for Regal to get the shares owing to lack of funds and that the directors in taking the shares were really acting as members of the public. We cannot accept this argument. It was impossible for the *cestui que* trust in *Keech* v. *Sandford, supra,* to obtain the lease, nevertheless the trustee was accountable. The suggestion that the directors were applying simply as members of the public is a travesty of the facts. They could, had they wished, have protected themselves by a resolution (either antecedent or subsequent) of the Regal shareholders in general meeting. In default of such approval, the liability to account must remain."

We would dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Shook Lin & Bok; Skrine & Co.*

MURUGAN v. LEW CHU CHEONG

[F.C. (Raja Azlan Shah C.J. (Malaya), Syed Othman & Abdul Hamid F.JJ.) March 14 & April 16, 1980]

[Kuala Lumpur — Federal Court Civil Appeal No. 96 of 1978]

Tort — Negligence — Road accident — Finding by trial court — Appeal on question of fact — No reason to interfere with decision of trial judge.

Practice and Procedure — Finding of fact by trial judge — Appeal — No reason to interfere with decision of trial judge — Highway Code, r. 18.

Evidence — Failure to call witness — Reasonable explanation — Evidence Act, 1950, s. 114(g).

This was an appeal from the decision of Chang Min Tat F.J., sitting in the High Court, in which he found the appellant was totally to blame for the accident which occurred between the respondent's motorcar and the appellant's motor cycle. The learned trial judge found that the appellant had cut across the right in circumstances which give the car no room or chance to pass it on its right. The appellant appealed. The appeal was on questions of fact.

Held: the appellant had failed to establish that there was any error of fact or law or that there was a misdirection of himself by the judge to warrant an interference of the decision by the appeal court.

HIGH COURT.

Tara Singh Sidhu (*K. Pasupathy* with him) for the plaintiff.

V.P. Nathan for the defendant.

Cur. Adv. Vult.

Chang Min Tat F.J.: The accident between the motor-cyclist plaintiff and the defendant motorist occurred when the motor-cyclist cut across the path of the following motorist in turning to a side road on the right. It took place almost on the crown of the road.

The question as always is liability for the accident.

The motor-cyclist said he was travelling on his left side of the road. When about 30 yds. from the junction, he gave a right-hand signal. By this signal, he intended to indicate his intention to turn right. At this time he was aware of a car behind him. He had turned round to look and he estimated it to be some 90 yards behind him. Then after proceeding some 5-10 yards or so, he commenced to turn.

His evidence was to a certain extent corroborated by two persons who were at the road side waiting for a bus. They were on the same side and were waiting for a bus coming from the direction of the motor-cycle. Because of this, they said, they were looking in his direction. They therefore saw the way events developed leading to the accident. There were some minor discrepancies in the assessments of distances. These were to be expected. But there was one discrepancy of some importance. Jamaruddin PW3 largely agreed with the plaintiff. Letchuman, PW2, the other of the two bystanders, however, did not agree that the motor-cyclist moved from the left side before the junction was reached. The witness said the motor-cyclist turned from the left side of the road at a point directly opposite the side road. The defendant charged the plaintiff with suddenly turning across his path. He would therefore appear to have been supported by Letchuman.

The question whether the motor-cyclist suddenly turned across the motorist's path is, in my view, crucial to the question of liability for the accident. If as the motor-cyclist said, he had turned gradually to the middle portion of the road, in order to turn into the side road leading to Roswell Estate, long before the motor-car had come up to him, he would have left ample room for the car to pass him on his left. There would be no necessity for the motorist to turn to the right and run down the motor-cyclist either from behind or from the side. On the other hand, if the motor-cyclist had suddenly turned across the motorist's path, he would have compelled the motorist to take evasive action by swerving to his right and if in certain circumstances, the action he took was not sufficient to avoid the accident, it would not be his fault.

But before this question could be answered, I have to consider the credibility of the motorist as a witness. I appreciate of course that in a clear sense, both he and the plaintiff are interested witnesses. In this case I was therefore more than a little surprised that in his examination-in-chief, he claimed he had no time to apply his brakes. He meant he did not apply his brakes at any time. I was surprised because the indications on the sketch were clearly that he had. The motorist's admission of course was such as not to invite cross-examination, but in fairness to him, as I considered it, since his counsel failed to show him the sketch, I did so, but he still maintained he did not. As a party to the action, he was therefore either a witness who was unconcerned about the outcome of the case or one who was not prepared to say anything that he could not really or truly remember. On my view of him, I prefer to regard him in the latter category.

The answer to the question which I have to decide lies, I think, in the "uncontrovertible evidence"

of the damages to the vehicles and the marks on the road. The motor car sustained damages to the near side front bumper, lamp and mudguard. The motor-cycle was damaged on its offside front, around the handle-bar. There were no damages whatsoever to the rear. The collision was therefore between the near side of the car and the offside of the motor-cycle at the area of the handle-bar. On the road itself, there were tyre marks made by the motor-car on the right-hand side of the road, in the direction in which the parties were travelling. They led to the right side table, the offside wheel clearly mounting this table, before swerving back to the road. The car was parked neatly on its correct side of the road some distance ahead when the sketch was made. Obviously, if it did stop there after the accident, it was parked there after the motorist had had time, after the collision, to park it there. The motor-cycle was lying on its side of the road near the central white line, after the side-road junction. A long scratch mark led to it. It commenced at a point on the centre of the other half of the road, just outside the entrance to the side-road. The collision was obviously at or just before the beginning of this scratch-line.

On the evidence of the motor-cyclist, that he had crossed, gradually, that is by an oblique path, to the other side of the road, the collision would have been between the offside of the car and the rear of the motor-cycle. Since the damages were otherwise, the accident could not have happened in this way. The damages establish, in my view, with some certainty, that the collision occurred when the motor-cycle presented its offside to the car, in other words, when the motor-cycle was travelling at right angles to the car. Since before this stage was reached, the car had been pulled to the other side of the road and brakes applied, the other conclusion must, in my view, be that the motor-cycle had cut across the road in circumstances which gave no room or chance to the car to pass it on its left but which compelled the car to pull sharply to the right as the only possible way to get round the motor-cycle and avoid a collision. Users of the road are, I am sure, not unused to such manoeuvres of motor-cyclists. Even when they know that traffic is coming up behind them, they or some of them would cut across and leave it to the traffic from behind to avoid them. Some think that merely by giving signals of intent they would be relieved of any responsibility for the accident. But rule 16 of the Highway Code requires signals to be given in good time. Rule 18 may not be strictly relevant, but with respect, I should have thought that the prudence advocated in that rule must be extended to require that a road user must have regard for his own safety and the safety of others as not to turn to his right unless he can be reasonably certain that he could do so without causing traffic coming up from behind to run into him or without putting such traffic into emergency action. If he does so in circumstances which gave the motor-car no chance whatsoever, whatever the driver did, to avoid the collision, the blame, in my view, must lie entirely on him. To my mind, this was such a case.

A question was raised with regard to the use of the motor-car's horn. The motor-cyclist said he did not hear any horn from behind him. The motorist said he sounded his horn. The two bystanders also did not hear the sound of a horn. They were some distance away and so far as they were concerned, their evidence was not in my view conclusive. While a sound may be heard, recognition of it is a conscious effort of the mind, and there was nothing before the accident to cause them to register the sound of a horn, if in fact it was made. The evidence therefore was strictly between the plaintiff and the defendant. But I also take the view that when an emergency is suddenly created, then the use of a horn is meaningless for the avoidance of an accident. Further, I have not been advised that in any and every instance of overtaking, the horn must be sounded. In my view, there can be no necessity on a clear road and where there is no oncoming traffic.

Lastly, I was asked to draw an adverse inference under section 114(g) Evidence Act, 1950 against the motorist from the failure to call his travel companion as his witness. His explanation was that he did not know her address. This explanation was unchallenged and must therefore be accepted as sufficient to prevent the raising of the inference.

The special damages are agreed at $747. One of the remaining two items is for the cost of replacing the artificial leg at intervals and maintenance thereof. This item is somewhat different from the claim in the written submission for a spare leg, but the claim as in the writ is too precise and should be incorporated in the general damages. Loss of past earnings, I would accept at $7,100 and if awarded it ought to bear interest at 3% p.a. from the date of the accident to the date of judgment.

The plaintiff lost a leg — a dreadful injury which would have merited considerable damages if the accident was not his fault. I would have awarded $20,000 for pain and suffering and for loss of amenities and on the facts pertaining to his life, also $27,000 for loss of earnings.

The claim, however, not without regret, is dismissed with costs.

From the above judgment the plaintiff appealed to the Federal Court.

FEDERAL COURT.

Tara Singh Sidhu (*K. Pasupathy* with him) for the appellant.

V.P. Nathan for the respondent.

Cur. Adv. Vult.

Abdul Hamid F.J. (delivering the judgment of the Court): The appeal is against the decision of Chang Ming Tat F.J. given at Kuala Lumpur on June 2, 1978 dismissing the appellant's claim both in respect of liability and quantum.

On July 21, 1974 the appellant was riding his motor-cycle along Jalan Assam in the direction of Klang. The respondent driving a motor-car was travelling along the same road in the same direction. An accident between the motor-cycle and the motor-car occurred just before the appellant turned into the side-road on the right.

The learned trial judge arrived at a finding that the appellant "had cut across the right in circumstances which gave no room or chance for the car to pass it on its right but which compelled the car to pull sharply to the right as the only possible way to get round the motor-cycle and avoid a collision."

At the hearing of this appeal Mr. G.T.S. Sidhu, counsel for the appellant, conceded that the appellant was negligent but contended that the respondent was guilty of contributory negligence on the grounds that the respondent was riding his vehicle at an excessive speed; that the collision took place on the wrong side of the road; that the respondent only stopped some 70 feet away after impact; that the respondent had seen the appellant 200 feet ahead of him and that the learned trial judge accepted that signal was given by the appellant.

The appellant also contended that if the respondent did not sound his horn he was negligent in failing to give warning of his approach and, if he did, he was still guilty of contributory negligence for reason that he knew that the appellant was going to turn right into the side-road and ought therefore to have adjusted his speed in anticipation of the appellant turning right.

The grounds raised before us are primarily questions of fact. They were very carefully considered by the trial judge. It is also evident that the trial judge closely scrutinized the testimony of the witnesses and did bear in mind that the respondent was an interested witness in assessing his credibility as a witness. It is further evident that the trial judge paid special attention to the silent evidence which he described as the "uncontrovertible evidence" of the damage to the vehicle and the marks on the road. The trial judge found as a fact that the collision was between the near-side of the car and the off-side of the motor-cycle at the area of the handle bar and it took place slightly between the central white line 5 or 6 feet away from the side-road.

The main question before the learned trial judge was whether the appellant made a sudden turning across the road. In this respect we quote that part of his judgment where he said —

"The question whether the motor-cyclist suddenly turned across the motorist's path is, in my view, crucial to the question of liability for the accident. If as the motor-cyclist said, he had turned gradually to the middle portion of the road, in order to turn into the side road leading to Roswell Estate, long before the motor-car had come up to him, he would have left ample room for the car to pass him on his left. There would be no necessity for the motorist to turn to the right and run down the motor cyclist either from behind or from the side. On the other hand, if the motor-cyclist had suddenly turned across the motorist's path, he would have compelled the motorist to take evasive action by swerving to his right and if in certain circumstances, the action he took was not sufficient to avoid the accident, it would not be his fault."

The appellant's contention that he gradually crossed the road was rejected by the trial judge. Instead he found that the collision occurred when the appellant was travelling at right-angle to the car. In our opinion the trial judge made a very pertinent observation when he said —

"Users of the road are, I am sure, not unused to such manoeuvres of motor-cyclists. Even when they know that traffic is coming up behind them, they or some of them would cut across and leave it to the traffic from behind to avoid them. Some think that merely by giving signals of intent they would be relieved of any responsibility for the accident. But rule 16 of the Highway Code requires signals to be given in good time. Rule 18 may not be strictly relevant, but with respect, I should have thought that the prudence advocated in that rule must be extended to require that a road user must have regard for his own safety and the safety of others as not to turn to his right unless he can be reasonably certain that he could do so without causing traffic coming up from behind to run into him or without putting such traffic into emergency action. If he does so in circumstances which gave the motor-car no chance whatsoever, whatever the driver did, to avoid the collision, the blame, in my view, must lie entirely on him. To my mind, this was such a case."

On the question of the sounding of the horn the trial judge said he could not find any conclusive evidence. That evidence was strictly between the appellant and the respondent. Nonetheless, he held that —

"While a sound may be heard, recognition of it is a conscious effort of the mind, and there was nothing before the accident to cause them to register the sound of a horn, if in fact it was made. The evidence therefore was strictly between the plaintiff and the defendant. But I also take the view that when an emergency is suddenly created, then the use of a horn is meaningless for the avoidance of an accident. Further, I have not been advised that in any and every instance of overtaking, the horn must be sounded. In my view, there can be no necessity on a clear road and where there is no oncoming traffic."

In so far as it concerns this appeal it is abundantly clear that the learned trial judge had made a thorough and complete analysis of all the material evidence available before he made specific findings of fact and we are satisfied that he drew proper inferences of fact and had made appropriate assessment of the witnesses's credibility. The appellant has failed, in our view, to establish that there was any error of fact or law or that there was a misdirection of himself by the judge to warrant a revision of his decision.

In consideration we feel that there is no ground whatever to justify this court to interfere with the decision of the trial judge. We therefore, dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Murphy & Dunbar; Richard Talalla & Co.*